

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1275

COMMONWEALTH

vs.

HERMINIO DELGADO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant committed separate indecent assaults upon a mother and her eighteen year old daughter, when he was living in their home. He was convicted by a jury of indecent assault and battery against both victims; he was also convicted of a simple assault and battery against the daughter. The defendant argues that (1) the evidence was insufficient to prove that the alleged touching of the daughter was indecent under G. L. c. 265, § 13H, (2) the judge erred when she allowed the mother to give first complaint testimony that was inconsistent with the mother's voir dire testimony, and (3) the judge invaded the jury's fact-finding province when she clarified the mother's testimony regarding the location where the defendant touched her. We affirm the convictions for indecent assault and battery against both victims, and vacate the conviction for assault and battery

against the daughter as duplicative of the indecent assault against her.

Background. "We recite the facts as the [jury] could have found them, drawing all reasonable inferences in the light most favorable to the Commonwealth." Commonwealth v. Rosa, 94 Mass. App. Ct. 458, 459 (2018). In February of 2016, the mother and daughter allowed the defendant to stay in a room in their home for approximately one to two months.<sup>1</sup> It was during this period that the assaults occurred.

The first assault occurred on the daughter, on February 4, 2016. The daughter testified that the defendant told her that he wanted to show her something in the bedroom. When the daughter entered the room the defendant pushed her against the wall by pressing his arm and body against her chest. While holding her against the wall, the defendant asked to see her breasts and attempted to grab her vagina. The daughter pushed the defendant's hand away and then left the home entirely, and went to stay at a friend's house.

The second assault occurred on the mother, on February 6, 2016. The mother testified that she was sitting in her bedroom when the defendant entered the room uninvited. The defendant

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<sup>1</sup> The defendant is a distant relative of the daughter's boyfriend.

lay down on the bed next to her, stretched out his arms and began touching her upper thigh, approximately two to three inches from her groin. The mother pushed the defendant's hand away from her leg. The defendant left the room and the mother locked herself inside. The following morning she left the home to stay at a friend's house.

The daughter and the mother also served as first complaint witnesses for each other. The Commonwealth presented evidence that the mother and daughter disclosed the assaults to each other during a conversation on February 7; however, their respective recollections of that conversation differ. The daughter testified that on the morning of February 7, she received a phone call from her mother, while the daughter was still at her friend's house. During that conversation the mother stated that the defendant had assaulted her the previous day.<sup>2</sup> The daughter then related the assault that she had experienced. The daughter then contacted her brother, who accompanied her back to the house and called the police. The defendant was arrested that day.

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<sup>2</sup> The daughter initially testified that this conversation took place on February 6. On further direct examination she testified that this conversation occurred on the day that the police arrested the defendant, which was in fact February 7.

The mother, on the other hand, testified that her daughter called her on the morning of February 7 to determine why she was not at home, but that they did not discuss allegations of assault at that time. The mother stated that her conversation with the daughter regarding the defendant's assaults occurred in person that same day, on the street outside their home after the daughter arrived with her brother.

The defendant was tried in November of 2016 on two counts of indecent assault and battery and two counts of simple assault and battery -- one each for both victims. The defendant was found guilty of two counts of indecent assault and battery (one for each victim), and one count of assault and battery against the daughter.<sup>3</sup> The court entered a required finding of not guilty on the charge of assault and battery against the mother. The defendant appeals.

Discussion. On appeal the defendant raises three arguments, none of which have merit.

1. Sufficiency of the evidence. The defendant first argues that the daughter's testimony was not sufficient to establish the element of an "indecent" touching, because the

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<sup>3</sup> The defendant was sentenced to two and one-half years, eighteen months to serve, with the balance suspended for three years, for the indecent assault against the daughter, and a concurrent one-year sentence for the simple assault against the same victim. The defendant received probation for the indecent assault against the mother.

daughter testified to pushing the defendant's hand away before he could grab her vagina. We disagree.

Our sufficiency review examines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Colon, 93 Mass. App. Ct. 560, 562 (2018), quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). To sustain a conviction for indecent assault and battery on a person age fourteen or more, the Commonwealth must prove "an intentional, unprivileged and indecent touching of the victim" (citation omitted). Commonwealth v. Mosby, 30 Mass. App. Ct. 181, 184 (1991). The sufficiency of the first two elements is not contested here. The sole question is whether the defendant's touching of the daughter was "indecent."

As to what constitutes an "indecent" touching, we have said that "it is a touching that is fundamentally offensive to contemporary moral values . . . and that society would regard as immodest and improper because of its sexual overtones" (quotations and citations omitted). Colon, 93 Mass. App. Ct. at 562. We evaluate the evidence in light of all the circumstances, Commonwealth v. Cruz, 93 Mass. App. Ct. 136, 139 (2018), and we have held that an unwanted touching can be indecent, even where the defendant did not touch the victim's

"private area" or "sexual parts." Colon, 93 Mass. App. Ct. at 562-563, and cases cited. In evaluating whether a touching is indecent our cases have considered facts in addition to the type of physical contact that occurred -- such as the presence of sexual commentary, surreptitious behavior, disparity in age, and the use of force.

Here, even assuming that the defendant did not actually touch the victim's private areas,<sup>4</sup> the defendant's actions in total satisfied the element of indecency. First, the defendant lured the daughter to his bedroom under false pretenses. Then he pushed her against a wall by pressing his arm and body against her chest, made a comment about wanting to see her breasts, and reached to grab her vagina before she pushed him away. In addition to the unwanted touching and attempted touching, this conduct was surreptitious, there was sexually charged commentary and behavior, and there was use of force to

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<sup>4</sup> The evidence that the defendant pressed the daughter's "chest" arguably constituted an actual touching of private areas. In addition, the daughter's affidavit in support of a restraining order, which was introduced in evidence, stated that the defendant actually touched her vagina. The defendant contends that the statement in the restraining order affidavit could not be used as evidence of indecency because the affidavit was not admitted for all purposes, but only was admitted as a prior inconsistent statement which was not corroborated. See Commonwealth v. Daye, 393 Mass. 55, 74 (1984). Here we need not rely on the above evidence of a direct touching, however, because there was sufficient evidence of indecency without it.

limit the victim's movement while the defendant attempted to touch her. The conduct was sufficient for the jury to find that the assault was indecent. See Colon, 93 Mass. App. Ct. at 563 (a forced hug and ear licking was sufficient); Commonwealth v. Castillo, 55 Mass. App. Ct. 563, 567 (2002) (kiss coupled with surreptitious behavior, use of force, and disparity in age was sufficient); Mosby, 30 Mass. App. Ct. at 185 (touching victim's buttocks and making distinctly sexual comments was sufficient).

2. The first complaint testimony. The defendant next argues that the judge erred in allowing the mother to give first complaint testimony at trial that was inconsistent with her previous voir dire testimony. This argument fails at the outset because its premise is incorrect -- the mother did not give inconsistent testimony as the defendant asserts. The defendant claims that the mother testified during voir dire that her daughter made the first complaint over the phone, whereas the mother testified at trial that the daughter made the first complaint in person. However, the record shows that the mother did not testify at voir dire that the first complaint was made over the phone; rather it was the prosecutor, not the mother, who mistakenly referenced a phone call during voir dire.<sup>5</sup>

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<sup>5</sup> We do not mean to imply that the mother's first complaint evidence would be inadmissible if it in fact was inconsistent with her voir dire testimony. We need not reach that issue here.

Although the mother did not testify inconsistently with her prior testimony, it is nevertheless true that the mother and daughter contradicted each other regarding whether the first complaint conversation took place in person, or over the phone. This inconsistency, however, does not affect the admissibility of the first complaint evidence, but rather goes to its weight. Commonwealth v. Dale, 86 Mass. App. Ct. 187, 190 (2014). The admissibility of first complaint testimony is a discretionary question for the judge. Commonwealth v. Aviles, 461 Mass. 60, 73 (2011). Memory is imperfect, and the jury were fully capable of evaluating the inconsistencies and their significance. We do not think the judge abused that discretion where the record indicates that the judge carefully considered the evidence, was aware of the inconsistencies, and stated -- in accordance with the case law -- that such inconsistencies were fodder for cross-examination. See Commonwealth v. Sullivan, 78 Mass. App. Ct. 631, 635-637 (2011) (Grasso, J., concurring) (first complaint testimony admissible where one witness claimed conversation occurred on a Saturday and the other claimed it was a Sunday).

3. The mother's demonstrative testimony regarding where she was touched. The defendant also argues that the judge invaded the jury's fact-finding province when the judge clarified the record concerning the mother's testimony as to where she was touched on her leg. There was no error. During



the mother's testimony regarding the assault on her, the mother pointed to the area of her thigh where the defendant touched her. The judge interrupted the mother's testimony, and at sidebar the judge explained that she believed the mother had not demonstrated a touching that was indecent. After further discussion the judge stated explicitly that she did not get a good look at exactly where the mother indicated she was touched. Over objection the judge allowed the Commonwealth to ask the question again, and instructed the mother to face the judge while pointing to where the defendant touched her, and to do the same for the jury. The judge then advised counsel at sidebar of what she was going to say for the record, after which she stated: "I just want the record to reflect that the witness pointed to an area on the front of her thigh approximately two to three inches from her groin."

The judge's actions here were permissible, and well within her discretion. The judge is "the directing and controlling mind [of a] trial." Whitney v. Wellesley & Boston St. Ry., 197 Mass. 495, 502 (1908). As such, the judge may clarify testimony where it is vague; she may ask witnesses to repeat themselves when they cannot be heard; and a judge may clarify evidence for the record. See Commonwealth v. Petetabella, 459 Mass. 177, 188 (2011); Commonwealth v. Gomes, 54 Mass. App. Ct. 1, 5-6 (2002); Commonwealth v. Rosadilla-Gonzalez, 20 Mass. App. Ct. 407, 414

(1985). Here the judge's actions in making a clearer record were entirely appropriate -- all the more so where counsel were advised of what the judge would say in advance, and did not object to the clarifying statements.<sup>6</sup>

4. The conviction for simple assault and battery of the daughter. Finally, the conviction for simple assault and battery of the daughter must be vacated because it is duplicative of the conviction for indecent assault and battery.<sup>7</sup> See Commonwealth v. Moran, 439 Mass. 482, 489 (2003). Assault and battery is a lesser included offense of indecent assault and battery on a person age fourteen or more. Commonwealth v. Morin, 52 Mass. App. Ct. 780, 787 (2001). Convictions for greater and lesser included offenses can only be sustained where there are separate and distinct acts to support each offense. Commonwealth v. Rodriguez, 83 Mass. App. Ct. 267, 273 (2013). There are not separate and distinct acts here, where the

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<sup>6</sup> The defendant also contends that the judge had made up her mind that the evidence was not sufficient as a matter of law, and that she could not revisit the issue by prompting the Commonwealth to ask the question again. This is incorrect; the judge was free to revisit the testimony, and to seek to clarify it. See Commonwealth v. Edmonds, 365 Mass. 496, 504 (1974) (judge has discretion to require additional foundation evidence where necessary).

<sup>7</sup> Although the defendant did not raise the duplication issue in his brief, we address it here because the conclusion of duplication follows from our reasoning.

defendant's act of pushing the daughter against the wall, together with the surrounding circumstances, formed the basis for the indecent assault and battery conviction.<sup>8</sup>

Conclusion. The judgments on the charges of indecent assault and battery are affirmed. On the charge of simple assault and battery, the judgment is vacated, the verdict is set aside, and the complaint is to be dismissed.

So ordered.

By the Court (Maldonado,  
McDonough &  
Englander, JJ.<sup>9</sup>),

*Joseph F. Stanton*

Clerk

Entered: July 12, 2019.

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<sup>8</sup> Even if we considered the daughter's statement in her affidavit that the defendant touched her vagina, we still would not conclude that both convictions could be sustained. The two acts -- pressing against the daughter's chest and grabbing her vagina -- were not sufficiently distinct to sustain both convictions where the acts were so closely related in time, form of conduct, and the defendant's intent. See Commonwealth v. Suero, 465 Mass. 215, 219 (2013).

<sup>9</sup> The panelists are listed in order of seniority.